

# California's Prop 65 Amendments One Year Later: Litigation Trends and What to Look Out For

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Over the past 10 years, the number of private Proposition 65 actions against businesses have nearly quadrupled from 604 in 2009 to 2,364 in 2018. Additional Prop 65 regulations on “safe harbor” warnings and online retailers took effect last August, clarifying the duties of online retailers regarding warnings, which may have caused a decrease in new Prop 65 actions against online retailers.

In light of the new rules and litigation trends, we examine which products are likely to face litigation and offer two ways companies might avoid liability, including by (1) considering the use of “safe harbor” warnings and (2) staying up to date with Prop 65 litigation and the regulations promulgated by the California Office of Environmental Health Hazard Assessment’s (OEHHA) regulations.

## **Prop 65 Notice Trends**

A year after the amendments, trends in Prop 65 notices reveal the chemicals, products, and services most likely to face litigation.

### ***Less Litigation Involving Products Sold Online***

From 2014 to 2017, online retailers faced an ever-growing tide of private Prop 65 litigation. The chart below shows how notices against online retailers increased dramatically over time, especially in 2016 and 2017. Notably, the OEHHA enacted the new regulations regarding online retailers in August 2016 and the number of notices spiked sharply in 2017. But since the new rules took effect in August 2018, the rate of notice filings has decreased significantly. Businesses should be aware, though, that plaintiffs are beginning to target online retailers for missing or inadequate Prop 65 warnings on webpages and this trend could change.

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## **More Litigation Involving Food and Plastic Products**

Over the last five years, notices involving chemicals in plastics have increased considerably. This is especially true with the chemicals di(2-ethylhexyl)phthalate (DEHP) and diisononyl phthalate (DINP). Most commonly, manufacturers use DEHP and DINP to produce plastic in products ranging from backpacks and clothing to headphones and hand tools. From 2018 to 2019, there were over three and a half times as many notices for DEHP and/or DINP as there had been between 2013 to 2014, just after DINP was officially added to the Prop 65 list.[1]

Similarly, notices for chemicals in food products have significantly increased. Notices regarding acrylamide — a chemical found in a wide range of roasted foods such as coffee, cereal, and nuts — spiked sharply in 2017 and have since plateaued.[2] This plateau may be a result of the OEHHA changing its rules regarding acrylamide warnings for cereal and coffee. Notices for cadmium and lead have also increased, particularly in dietary supplements.[3]

Prop 65 private enforcement actions are likely increasing overall because of the profitability and ease of bringing actions. Prop 65 plaintiffs do not have the burden of proving that the product in question *is not* safe. Instead, the burden is on the manufacturer or retailer to prove that the product *is* safe, which can be expensive given the costs of chemical testing and expert witnesses. Additionally, Prop 65 claims are profitable, especially for plaintiffs' attorneys. In 2018, defendants paid over \$35.1 million in settlements, 77.5 percent (or \$27.2 million) of which went to attorneys' fees.[4]

## **Two Considerations for Businesses Moving Forward**

### **1. Use “Safe Harbor” Warnings**

The considerable decrease in notices against online retailers may have resulted because the new amendments regarding how, where, and when to use “safe harbor” warnings online are clear. “Safe harbor” warnings bring businesses into compliance with Prop 65 and provide a defense to enforcement actions, therefore lowering the risk of private actions as well.

Prop 65 requires companies to provide a “clear and reasonable” warning to potential consumers if a product contains one of the over 950 enumerated chemicals. The new regulations changed a number of Prop 65 requirements (see [previous blog post](#) for a more complete description). The most notable changes were (1) adjustments to the “safe harbor” language and (2) a new requirement that online and catalog retailers provide Prop 65 warnings on products and on their websites and hardcopy catalogues.[5]

Before filing a Prop 65 enforcement action, private plaintiffs must send a 60-day notice to the California Attorney General's Office informing it of the alleged violation and their intention to sue. [These notices are available](#) for review on the Attorney General's website.

Businesses — especially online retailers — not currently using these warnings may want to take a second look at them, because plaintiffs are beginning to bring notices specific to the new regulations. Similarly, businesses dealing in food and plastic products that contain chemicals that are increasingly litigated, like food and plastic products, may also want to consider using “safe harbor” warnings.

### **2. Stay Up to Date with OEHHA Regulations and Litigation**

The Prop 65 enforcement landscape changes continually. The OEHHA frequently adds and removes chemicals from the Prop 65 list. And compliance requirements for certain chemicals can change due to ongoing challenges regarding chemical safety levels in consumer goods. For example, recent litigation led the OEHHA to suspend requiring warnings for Acrylamide in cereal while the FDA researches the impacts of the chemical.[6] Similarly, the OEHHA — following prolonged litigation — recently passed a regulation effective in October 2019 clarifying that warnings are not required for Acrylamide in coffee.[7] Businesses can stay in compliance with Prop 65, avoid future litigation, and avoid using unnecessary warning labels by staying up to date on litigation efforts and OEHHA developments.

The OEHHA provides updates and news on Prop 65 developments through its listserv. To receive updates, sign up [here](#).

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[1] This trend is clear over time. From 1/1/2013 to 1/1/2014, 398 notices were filed. From 1/2/2014 to 1/1/2015: 407 notices. From 1/2/2015 to 1/1/2016: 680 notices. From 1/2/2016 to 1/1/2017: 643 notices. From 1/2/2017 to 1/1/2018: 927 notices. From 1/2/2018 to 1/1/2019: 1453 notices

[2] From 1/1/2013 to 1/1/2016 notices for Acrylamide ranged from 2-3 per year. In 2016, notices jumped to 32. In 2017, notices spiked to 144. In 2018, there were 147 notices.

[3] In 2014 there was one notice for cadmium and lead in a dietary supplement. In 2015 there were nine notices. In 2016 there were 28 notices. In 2017 there were 20 notices. In 2018 there were 54 notices.

[4] California Attorney General's Office, *Proposition 65 Settlement Executive Summary* <https://oag.ca.gov/sites/all/files/agweb/pdfs/prop65/2018-summary-settlements.pdf>

[5] *Proposition 65 Clear and Reasonable Warnings Questions and Answers for Businesses: Internet and Catalog Warnings*, Office of Environment Health Hazard Assessment, California Environmental Protection Agency (March 2018), [https://www.p65warnings.ca.gov/sites/default/files/art\\_6\\_business\\_qa\\_internet\\_warnings.pdf](https://www.p65warnings.ca.gov/sites/default/files/art_6_business_qa_internet_warnings.pdf)

[6] Ryan Boysen, *Cereal Cos. Don't Have to Post Cancer Warning, Panel Says*, Law360 (July 17, 2018)

[7] *Notice of Adoption – Section 25704 Exposures to Listed Chemicals in Coffee Posing No Significant Risk*, (June 7, 2019)

<https://oehha.ca.gov/proposition-65/cnr/notice-adoption-section-25704-exposures-listed-chemicals-coffee-posing-no>

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